IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 409 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRAKASH MIYAMAL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 409 of 1992

MR NAGIN N GANDHI for Petitioner No. 1

PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 19/01/2002

ORAL JUDGEMENT

#. This Criminal Revision Application under Section 397 of the Criminal Procedure Code, 1973 has been preferred by the petitioner above named challenging the judgment and order dated 28.12.1992 recorded by the learned

Additional Sessions Judge, Bhavnagar in Criminal Appeal No.30/1992 under which the learned Additional Sessions Judge dismissed the appeal of the present petitioner and confirmed the judgment and conviction order recorded by the learned JMFC at Bhavnagar dated 23.7.1992 in Criminal Case No.2400/1986 under which the learned Magistrate convicted the present petitioner alongwith the other accused person for the offences punishable under Section 323 read with Sections 149, 147 and 148 of the I.P.C. and sentenced the petitioner and other four accused persons to suffer S.I. for six months. Each accused person was directed by the learned Magistrate to pay fine of Rs.500/- and in default each of them was required to undergo further S.I for 1 month. The learned Magistrate had acquitted all the 5 accused persons from the offence punishable under Section 504 and 506(2) of the I.P.C. read with Section 114 of the I.P.C. as well as for the offences punishable under Section 135 of the Bombay Police Act.

#. In fact the learned Additional Sessions Judge while confirming the judgment and conviction order against the present petitioner was pleased to allow the said appeal for other 4 accused persons and they all were acquitted by the learned Additional Sessions Judge.

#. Feeling aggrieved by the said judgment and order of the learned Additional Sessions Judge, Bhavnagar the present petitioner original accused No.1 has preferred this Revision Application before this court. It has been mainly contended that there was no evidence before the trial Court to connect the present petitioner with the offence in question. That the evidence of the original informant was not supported by any material on record including the medical evidence. That, therefore, there was legal error on the part of the learned Additional Sessions Judge as well as on the part of the learned Magistrate in convicting the present petitioner for an offence punishable under Section 323 of the I.P.C. That on the whole two judgments and conviction order against the petitioner are illegal and erroneous and deserve to be set aside. The petitioner has, therefore, prayed that the present application is required to be allowed, the aforesaid two judgments and conviction order of the two Courts below be set aside and the present petitioner be acquitted from the offence punishable under Section 323 of the I.P.C. On receipt of the Revision Application notice was issued at the first instance and rule was issued subsequently. Learned APP Mr.B.D.Desai appears on behalf of the State in response to the rule served. I have heard the learned advocate for the parties and have

perused the papers. In fact, the learned advocate for the petitioner has taken me through the evidence on record and has also taken me through the judgment of the two Courts below.

#. It has been mainly contended by the learned advocate for the petitioner that the petitioner's evidence has not been corroborated by any material on record and, therefore, there was a legal error on the part of the two Courts below when both the Courts convicted the present petitioner for an offence punishable under Section 323 of the I.P.C.

#. Now it is a matter of record that the informant has deposed before the trial Court at Ex.12 stating that the incident took place on 5.7.1986 at about 8:30 P.M. when he was beaten by the present petitioner by means of an iron pipe. It is also deposed by him that the iron pipe was struck on his left elbow. It is also contended by him that he had gone to the Medical officer for his treatment on the same night. The evidence gets corroboration to some extent by FIR Ex.13, which has been filed on the next date. There is further evidence of an eye witness Hiralal Shevaram at Ex.16 who has deposed before the Court below that the incident took place at about 8:30 P.M. That he heard some shout at the shop of one Kanaiyalal and that, therefore, he went to the spot and noticed that the informant was being beaten and the present petitioner had given a pipe blow on the left hand of the informant. That, therefore, the injury on the left hand elbow of the informant was bleeding; this shows that the pipe had struck on the left hand elbow of the informant forcefully.

#. We can turn to the evidence of the Medical Officer Dr.Jayantibhai at Ex.28, he has produced injury certificate at Ex.29. These two piece of evidence clearly show that the informant was examined by Dr.Jayantibhai at 10:30 P.M. on 5.7. 1986 i.e. the date of incident itself. The said two pieces of evidence further go to show that there was no external mark of injury on the left hand elbow of the informant but he had complaint of pain at that part of the body.

#. It has been observed by the learned Magistrate that since the injury was caused and pipe had struck on the bone of the elbow of the informant, there would not be any external mark of injury. This is not probable and hence not acceptable. Once an injury is caused by striking an iron pipe even on the bone part then it cannot be said that there would be absolutely no external

marks of injury, more so when it is not the case of the petitioner that he had no external mark of injury on his elbow. Even Hiralal Shevaram at Ex. 16 has clearly deposed that the injury on the left elbow of the informant was bleeding. Now, if there was injury and when the injury was bleeding then it will be impossible to accept that there was no external mark of injury.

#. Once there is a bleeding injury there would be some external mark of injury at the place where the pipe had struck. The oral evidence of Dr.Jayanti at Ex.28 and Injury Certificate Ex.29 clearly indicate that there was no external mark of injury. In that view of the matter when there was no external mark of injury there is hardly any possibility of believing the evidence of the informant that he was hit by an iron pipe by the present petitioner.

#. In that view of the matter, though the witness Hiralal Ex.16 has been believed by the learned Sessions Judge as well as by the learned Magistrate, the medical evidence shows that his evidence could not be accepted. Some way the evidence of the informant could also not be accepted in light of the discussion hereinabove.

##. Once the evidence on these two witnesses is not found to be acceptable then other witnesses have not supported case of the prosecution they have been treated hostile and they have not stated that the informant was beaten by the present petitioner by means of an iron pipe.

##. The learned APP has tried to argue that the muddamal pipe has been seized from the possession of the present petitioner. It is not the case of the prosecution that this muddamal pipe was stained with blood. Then mere possession of an iron pipe cannot lead us to infer that this pipe was used by the petitioner for beating the informant. Mere possession of a pipe in a house would not by itself be treated to be an incriminating substance against the petitioner. This type of pipe cannot be treated to be an instrument only used as a weapon in ordinary course of nature. Therefore, mere possession of this pipe, even if it is accepted to have been proved, cannot lead us to infer that this pipe was actually used by the petitioner for beating the informant. It is, therefore, clear that the evidence of the petitioner and Hiralal has not been supported by available medical evidence on record and in that view of the matter it has to be observed that the learned Additional Sessions Judge as well as learned Magistrate have committed serious

illegality in accepting the said version of the informant as well as of Hiralal at Ex.16 and once their evidence is omitted from consideration then there is no other material to connect the present petitioner with the offence in question.

##. It is also required to be considered that the learned Sessions Judge had considered the evidence of the above witnesses for the purpose of acquitting other 4 accused persons. There cannot be a rule that if a particular set of evidence has not been accepted for convicting some accused, the same set of evidence cannot be accepted for convicting other accused persons. But, the fact remains that the evidence was weighed by the learned Sessions Judge for acquitting other accused persons who were found to be guilty by the learned Magistrate.

##. In above view of the matter, it is quite clear that the appreciation of evidence cannot be treated to be legal and when the appreciation is not legal the conviction cannot be sustained.

##. For the foregoing reasons it has to be held that two courts below have committed an illegality in appreciation of evidence and, therefore, the said finding of fact cannot be accepted and confirmed by this Court. For the foregoing reasons this Revision Application is allowed and the judgment, and conviction orders passed by two courts below are set aside. The present petitioner is ordered to be acquitted of the offence punishable under Section 323 of the I.P.C. The bail bond submitted by him stands cancelled. The fine if paid be refunded to him. D.S. is permitted.

(D. P. BUCH, J.)
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